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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 206

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

SOUTHERN SILK MILLS, INC.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

BRIEF FOR SOUTHERN SILK MILLS, INC., IN OPPOSITION.

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The respondent, Southern Silk Mills, Inc., moves the Court to dismiss the writ of certiorari prayed for in this cause.

OPINIONS BELOW, JURISDICTION, QUESTIONS PRESENTED AND STATUTES INVOLVED.

The petitioner has satisfactorily set out in its petition the opinion below, jurisdiction, questions presented and statutes involved.

STATEMENT.

The statement made by the petitioner is correct in so far as it goes, but respondent feels that petitioner's statement should be enlarged so as to show the following facts:

There were originally 40 employees involved in the Board's order for reinstatement with back pay. Informal negotiations resulted in agreement as to the amounts due 38 of these 40 employees. All of the 40 employees, except these two, found some employment from the time they were discharged until they were reinstated in their former positions. These two employees, Mrs. Irene Hill and Mrs. Effie Fugate, were discharged on May 1, 1951. Mrs. Hill was reinstated in her job on June 7, 1954, and Mrs. Fugate, by her own admission, stopped looking for work on November 27, 1953. It was the insistence by these employees that during this time, three years, one month, seven days for Mrs. Hill; and two years, six months, twenty-seven days for Mrs. Fugate, they diligently looked for work, but were unable to obtain even one day's employment. They registered with the Tennessee Division of Employment Security at Rockwood, Tennessee, a town with only one mill with similar employment and did not register at Dayton, Tennessee, a town with four mills with simliar employment. Both towns being of about equal distance from Spring City, but Dayton being the county seat of their home county. They registered for work with the Employment Office

in order to draw their unemployment compensation. They did not keep their registrations up after they drew their unemployment compensation.

There is no factory employment available for women in Spring City, except at respondent's plant. The employees did not seek employment in other fields, but limited their search to employment as knitters. The record discloses that there was employment available in other fields, such as the freezing process plants, retail trades, and the gathering of agricultural crops.

The Board and Court of Appeals found that these two employees had no professional or highly technical training. The record also discloses that the husband of Mrs. Hill made better wages during this period than at any other time in his life; that both Mrs. Hill and Mrs. Fugate quit their employment soon after they were re-employed.

These facts were taken into consideration by the Court of Appeals in denying the Board's order and the cause was remanded to the Board for additional findings as to the amount of offsetting credits willfully incurred by these employees.

REASONS FOR DENYING THE WRIT.

1. Regarding Question Number One.

The interpretation of the law which the National Labor Relations Board is insisting on in this case would, in effect, tie the hands of the courts and the Board so that in the future, no matter how long a wage-

earner searched for work, he would never and under any circumstances have to accept other available, suitable employment. The Court of Appeals' construction of the law in this case is reasonable and uses common sense. Then, too, it is based on the facts of this case.

That part of the Court of Appeals' opinion complained of is as follows:

> "We are of the opinion, however, that the usual wage earner, reasonably conscious of the obligation to support himself and family by suitable employment after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay 'desirable new employment.' The fact that a married woman employee is being supported by her husband during the discharge period should not relieve her of the obligation to accept suitable employment. The failure of these two employees, under the conditions existing in the present case, to seek other suitable, available employment, although at a lower rate of pay over a period of approximately three years, constitutes to some extent at least loss of earnings 'willfully incurred.' We are of the opinion that the Board was in error in making the back-pay awards without offsetting credits against such losses."

It is the insistence of the Board that at no time during the approximate three years these employees searched for work was it incumbent upon them to seek other available, suitable employment at a somewhat lower rate of pay. For that matter, even had

the time of the search been five or even ten years, the Board insists that the employees would not be under any obligation to seek any employment other than that similar to which they had been accustomed.

The Board in a previous case similar to this made the same insistence. In the case of National Labor Relations Board v. Moss Planing Mill Co., 28 Labor Cases 69,395, 224 F. 2d 702 the Board insisted that a discriminatee did not have to seek or accept any work other than preaching or saw-mill work, while in this case the Board insists that these discriminatees did not have to seek any employment other than that as a knitter. The United States Court of Appeals, Fourth Circuit, did not agree with the Board's decision, and said:

> "We cannot accept the Board's conclusion that Fulcher was not obligated to seek and accept agricultural employment. The record discloses that such employment was available. The Board seems to think that Fulcher was bound to accept no work save preaching and work in saw mills. To us that seems quite unreasonable."

The Board in the Moss Planing Mill case, *supra*, and also in this case, is insisting on using a stereotype formula in reaching their decisions. In Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 4 Labor Cases, Section 51,120, the Board insisted that in reaching the amount due a wrongfully discharged employee, it should take into account only the actual earnings of the worker, and insisted that for it to take into account losses which the worker willfully incurred would be

placing too much work on the Board. This Court said in this regard: "Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

But the advantages of a simple rule must be balanced against the importance of taking fair account in a civilized legal system of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here, again, we must avoid the rigidities of an "either-or-rule."

Respondent insists that such a stereotype formula, cannot be used in a legal system such as ours, but that rules must be flexible so that each case can stand on its own bottom.

Also in the case of N. L. R. B. v. Pugh Barr, Inc., 207 F. 2d 409, 24 Labor Cases, Section 67,891, the United States Court of Appeals, Fourth Circuit, set aside the Board's order and remanded the case which the Board based its decision on the rule that the employee, having registered with the State Employment Agency, was not bound to make any further showing of diligence. The Court in this case said:

> "Bramer was an ordinary unskilled laborer and it appears that the large amount of back pay awarded him was due to the fact that the earnings credited for a period of two years was only $294.20. It is incredible that Bramer could not have earned more than this during that period if

he had made reasonable efforts to find employment, when the evidence shows that Trader, during the same period, was earning $5,133.61. The Board seems to have reached the conclusion that it did on the basis that Bramer, having registered with the State Employment Agency, was not bound to make any further showing of diligence. We do not think this is sufficient. The awarding of so large a sum as back pay without the finding of special circumstances justifying it cannot be sustained. We shall accordingly set aside the Board's order and remand the case to the Board with direction that it make specific findings of fact with respect to the matter and award to Bramer no more than the difference between what he could have earned by working for respondent if he had not been wrongfully discharged, and what he could have earned elsewhere if he had used due diligence to secure other employment."

The respondent respectfully insists that the lower Court has not by its decision changed the interpretation of the law. The lower Court simply held, based on the conditions existing in this case, that the employees by not seeking or taking other suitable available employment, although at a lower rate of pay over a period of approximately three years constitutes, to some extent at least, loss of earnings "willfully incurred."

"Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker, but also for losses which he willfully incurred." Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 198, 199.

"A wrongfully discharged employee to be entitled to back pay, must show that he made an honest attempt to obtain interim employment." Cashman Auto Co., 109 NLRB 105.

"The underlying principle is that it is the duty of the improperly discharged employee to so conduct himself as to keep his loss at a minimum." Condenser Corp., 128 F. 2d 67; Subin dba Arcadia Hosiery, 112 F. 2d 326.

"In awarding back pay, the Board, in making its computation, must deduct from the contemplated amount, such money as the employee could have earned." Hudson Motor Co., 136 F. 2d 385.

The lower Court arrived at its decision based on the facts of this case and viewing the evidence as a whole. They gave effect to the rule that where there has been a prolonged period of unemployment with little or no offset earnings, the record is scrutinized very carefully to make sure due diligence has been used. N. L. R. B. v. Pugh & Barr, Inc., 207 F. 2d 409, on remand, 111 N. L. R. B. 1353. The Trial Examiner arrived at the same conclusion as the lower Court and he had the opportunity to view the witnesses face to face.

The Board insists that the lower Court has laid down a hard and fast rule of law in this case that would bind the hands of the Board in future decisions and would replace the frame of flexible discretion within which the Board has operated in the past. The respondent insists that the lower Court decision would aid this flexible discretion spoken of in the Board's

brief. Certainly, as in this case, when the facts of the case demand, the Board should be permitted to find that the employees have not used due diligence in obtaining other work. When there is only one mill in town and that mill being the respondent, and there is no other similar employment in the vicinity. When it appears that the employees do not have any highly skilled or technical training. When it appears that there is other satisfactory employment in the vicinity which the employees are fitted to perform. Surely it was not the intent of Congress to require employees to search only for the same kind of emplyoment at the expense of remaining idle for years at the time.

The following quotation is from the opinion of the Court of Appeals, Second Circuit, in the case of Phelps Dodge Corp. v. N. L. R. B. 2 Labor Cases, Sec. 18,732. This Court gave force to this language in its opinion in the same case reported in 313 U. S. 177:

> "There is no reason to suppose that Congress intended to have those who had unlawfully been deprived of their jobs maintained in idleness beyond the period when they had an opportunity to do work they were fitted to perform. They are bound to use reasonable efforts to find work and to keep employed. It is only to the extent that their earnings were diminished after they made such efforts that they are entitled to be made whole. The same rule that applies to a discharged employee who sues for a breach of contract is applicable to them. Accordingly, the amount allowed each such employee should be the difference between his actual earnings plus what he failed

without excuse to earn and the amount he would have earned but for the unfair labor practices of the petitioner."

The respondent insists that the lower Court's holding that a discharge should be expected, for a certain period, to seek positions at least equal to his prior position, both as to salary and other working conditions, but after a time, after opportunities for comparable jobs have been canvassed without success, it then becomes the duty of the dischargee to lower his sights or face a long period of idleness, is more in keeping with the words, ". . . . discriminatees minimizing their loss of earnings stems not so much from the equitable principle of mitigation of damages as applied by the Court in private actions, as from the healthy policy of promotion production and employment," which were stressed in Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 200.

2. Regarding Question Number Two.

It is the insistence of the respondent on this question that the lower Court did not err, as this record contains much proof produced by the respondent showing the availability of other types of employment. The Trial Examiner found:

"There are two fields of work, however, which were not canvassed by the discriminatees which require careful consideration here. The first was work at the Southern Freezing and Preserving Company in Dayton. Both Mrs. Hill and Mrs.

Fugate knew of the existence of this plant and that one of their fellow dischargees had obtained work there. . . . Both dischargees made no effort to secure employment in the retail trades." (Trial Examiner's Opinion, pages 56, 57 of Appendix to Petitioner's Brief.)

CONCLUSION.

For the reasons stated, it is respectfully insisted that the petition for a writ of certiorari should be denied.

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